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SUPREME COURT, U.S.

NO. 80-6309

IN THE

SUPREME COURT FOR THE UNITED STATES

TERM 1980

GEORGE V. JANOVICH

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Petitioner, GEORGE V. JANOVICH, pursuant to Rule 53 and 18 U.S.C. § 3006A(d) (6), asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis. Petitioner was represented by Monte E. Hester, as retained counsel in the District Court and was later appointed to represent the Petitioner under the Criminal Justice Act, on appeal to the United States Court of Appeals for the Ninth Circuit. The petitioner proceeded before the Ninth Circuit Court of Appeals in forma pauperis.

WHEREFORE, Petitioner, by his undersigned counsel,

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respectfully prays that this Court grant leave to proceed in the Supreme Court of the United States in forma pauperis.

DATED this 5th day of March, 1981.

RESPECTFULLY SUBMITTED:

MONTE E. HESTER

Attorney for Petitioner

*

*

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OCTOBER TERM, 1980

GEORGE V. JANOVICH,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTE E. HESTER
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MARILYN G. PAJA,
on the brief

QUESTIONS PRESENTED

1. Whether violation of the restrictive requirements of the state privacy statute (REVISED CODE OF WASHINGTON CHAPTERS 9.73 and 10.79) prohibits admission of tape recording admitted into evidence in a federal court proceeding where the defendants are charged with state crimes ("RICO", 18 U.S.C. §1962 (c) and (d), conspiracy to violate state gambling laws)?

2. Whether the offenses charged were properly indicted §1962(c) and (d)(RICO) when the prosecution failed to show that the defendants were associated in a legitimate business enterprise?

3. Whether the defendant was denied a fair trial when the indictment failed to identify co-conspirators whose statements were introduced at trial and when an earlier request for a bill of particulars was denied?

4. Whether the defendant was denied a fair trial by the failure of the trial judge to instruct the jury on the issue and possibility of finding of multiple conspiracies?

LIST OF PARTIES

In addition to the parties named in the caption to this Petition, the following parties were also tried and convicted in the same proceeding: John Carbone, Joseph Carbone, Ronald Williams, Frank Mazzuca, Richard Francis Caliguri and Arnold Zemek.

TABLE OF CONTENTS

Questions Presented i
List of Parties i
Table of Authorities ii

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Opinion Below 2

Jurisdiction 2

Statutory Provisions Involved in the Case 2

Statement of the Case 2

Reasons for Granting the Writ:

1. Admissibility of Tape Recordings under State Privacy Statute 4

2. The RICO Issue 7

3. Mid-trial Identification of Unindicted Co-conspirators 9

4. Multiple Conspiracies and Severance 11

Conclusion 12

Appendix A-1

TABLE OF AUTHORITIES

Cases: Pages:

Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176, reh. den. 394 U.S. 939 (1969) 5

Fare v. Michael C, 439 U.S. 1310, 99 S.Ct. 3, 58 L.Ed.2d 19 (1978) 6

Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941) 6

Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) 5

Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) 5

People v. Conklin, 12 Cal. 3d 259, 114 Cal. Rptr. 241, 522 P.2d 1049 (1974) 6

Reid v. Colorado, 187 U.S. 137, 23 S.Ct. 92, 47 L.Ed. 108 (1902) 6

State v. Buckley, 145 Wash. 87, 258 Pac. 1030 (1927) 4

State v. Fields, 85 Wn.2d 126, 530 P.2d 284 (1975) 4

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Cases: Pages:

State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962) 4

State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980). 7

United States v. Aleman, 609 F.2d 298 (7th Cir. 1979) 8

United States v. Altese, 542 F.2d 104 (2d Cir. 1976), cert. den. 429 U.S. 1039 (1977) 8

United States v. Anderson, 626 F.2d 1358 (9th Cir. 1980) . . . . . 7 - 9

United States v. Anderson, 532 F.2d 1218 (9th Cir. 1976) 10

United States v. Anton, 547 F.2d 493 (9th Cir. 1976) 10

United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), reh. den. (1978) . . . . . 8 - 12

United States v. Euganks, 791 F.2d 513 (9th Cir. 1979) 11

United States v. Hall, 543 F.2d 1229 (9th Cir. 1976) 6

United States v. Kotteakos, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1957) 11

United States v. Rone, 598 F.2d 564 (9th Cir. 1979), cert. den. 100 S.Ct. 1345 (1980) . . . . . 7 - 8

United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973) 10

United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), reh. en banc granted (1980) . . . . . 7 - 9, 11

United States v. Swiderski, 593. F.2d 1246 . . 8

United States v. Turkette, 632 F.2d 896 (1st Cir. 1980) . . . . . 7 - 9

Williams v. United States, 289 F.2d 598 (9th Cir. 1961) 10

Statutes:

18 U.S.C. §§1961 - 68 (1970)(RICO) 7
18 U.S.C. §1961 (4) 8
18 U.S.C. §1962 (c) 8

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Statutes:	Pages:
18 U.S.C. §2511 (2)(c)	4
R.C.W. Chapter 9.73	
R.C.W. 9.73.050	4
R.C.W. Chapter 10.79	
R.C.W. 10.79.040	4
R.C.W. 10.79.045	4
Other Authorities:	
Federal Rules of Criminal Procedure, Rule 7	10

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NO. _____

IN THE

SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1980

GEORGE V. JANOVICH,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The petitioner, George V. Janovich, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgments of conviction entered against the petitioner by the United States District Court for the Western District of Washington.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at pages A-1 through A-49 . No opinion was rendered by the District Court for the Western District of Washington.

JURISDICTION

The date of judgment of the United States Court of Appeals for the Ninth Circuit was October 6, 1980, which was also the date of entry. On January 7, 1981, the United States Court of Appeals for the Ninth Circuit denied co-defendant Frank Mazzuca's properly filed petition and suggestion for re-hearing en banc. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

These are set forth in the Appendix at pages A-51, 52 and 56.

STATEMENT OF THE CASE

The petitioner, George V. Janovich, was charged, together with fourteen others (eight defendants pleaded guilty), in an indictment with offenses under 18 U.S.C. §1962 (commonly known as "RICO") and a series of seventeen underlying federal and state offenses having to do with the asserted goal of controlling the tavern business in Pierce County, Washington. Mr. Janovich was charged and found guilty of the RICO conspiracy and with obstructing the enforcement of the criminal laws of the state of Washington. Mr. Janovich was found guilty of the two offenses and was sentenced to twelve years total imprisonment.

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The petitioner was the elected Sheriff of Pierce County from 1975 until his conviction in 1979. It was alleged by the government at trial that in his position as Sheriff, the petitioner was able to provide aid to the overall and pre-existing conspiracy to control the local tavern business. Two other men named in the indictment (John and Joseph Carbone) owned several taverns in the area. The petitioner's aid allegedly took the form of protection from raids by law enforcement agencies and assistance in harassing local competitive tavern businesses.

Other defendants named in the indictment were tried jointly with the petitioner in a trial which lasted three-months. These other defendants were charged with specific crimes of violence including arson, extortion and assault, as well as the overall RICO conspiracy count. Mr. Janovich himself was never in any way linked to any acts of violence. In respect to the petitioner's acts which obstructed the regular law enforcement in the area, the evidence presented was slight and it was argued on appeal that the evidence was insufficient.

The otherwise innocuous testimony indicating that the petitioner lived near Joseph Carbone and was friendly with him became horrible when linked to evidence of Carbone's acts of violence and the acts of others alleged to be his agents.

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REASONS FOR GRANTING THE WRIT

1. Admissibility of Tape Recordings Under the State Privacy Statute

On appeal, the petitioner contended that tape recordings made in violation of the laws of the State of Washington should have been excluded from evidence.

The Washington statutes, REVISED CODE OF WASHINGTON, (R.C.W.) Chapters 9.73 and 10.79, specifically prohibit the recording of any conversation unless all parties to the conversation consent or unless there is a court order entered upon an appropriate showing. (The full text of both statutes are set forth in Appendix hereto.) A person violating the Act may be subject to civil penalties. R.C.W. Chapter 10.79, entitled "Searches and Seizures," makes a warrantless search or seizure unlawful and provides that a person participating in the unlawful act is guilty of a misdemeanor. R.C.W. 10.79.045. If evidence is gathered or adduced as a "fruit" of either of these unlawful state trees, it must be excluded from evidence as a matter of state law. R.C.W. 9.73.050; R.C.W. 10.79.040; State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962); State v. Buckley, 145 Wash. 87, 258 Pac. 1030 (1927); see generally State v. Fields, 85 Wn.2d 126, 530 P.2d 284 (1975).

The correlative federal statute is 18 U.S.C. §2511(2)(c), enacted in 1968. That statute allows a conversation to be recorded with the consent of only one party to the conversation:

> It shall not be unlawful under this chapter for a person acting under color of the law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties has given prior consent to such interception. 18 U.S.C. §2511(2)(c).

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In the case at bar, several tape recordings of conversations which took place within the State of Washington were admitted into evidence and were prejudicial to the petitioner's cause. The petitioner himself did not consent to recording of the conversations. In each case, a federal agent, as a party to the conversation, made and later identified the recording. No court order was applied for which would have permitted a recording to be made.

It is petitioner's position that even though the federal statute may govern when a federal offense is being charged in federal court, it cannot be applied in derogation of a more restrictive state law when a state crime is at issue -- regardless of the federal nature of the court. Although charged under the federal RICO statute, the petitioner was held for an underlying state offense: violation of the state gambling laws.

Clearly, within the concept of Federalism, state courts and legislatures may provide individuals within their jurisdiction greater individual rights and protections from police abuses than the minimum protections required by provisions of the United States Constitution. Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 575-76 (1975); Alderman v. United States, 394 U.S. 165, 175, 89 S.Ct. 961, 967-68, 22 L.Ed.2d 176, 188, reh. den. 394 U.S. 939 (1969); Ker v. California, 374 U.S. 23, 34, 83 S.Ct. 1623, 1630, 10 L.Ed.2d 726, 738 (1963). In Oregon v. Hass, supra, the Supreme Court held that although a state court should not be an arbiter of the Constitution,

> . . . a State is free, as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.

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(citations omitted) (emphasis in original).

Accord Fare v. Michael C., 439 U.S. 1310, 99 S.Ct. 3, 58 L.Ed.2d 19 (1978).

The Washington State prohibitions on recorded conversations, wire tapping, searches and seizures are not in conflict with federal law. The state provisions merely add to the federal constitutional minimum standards. The doctrine of preemption (grounded in the Supremacy Clause), should not apply here to forbid application of a state exclusionary rule to a state crime. It is only if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or if a federal scheme is so pervasive as to preclude any local interference that the state law must fall before the Supremacy Clause. Hines v. Davidowitz, 312 U.S. 52, 67-68, 61 S.Ct. 399, 403-4, 85 L.Ed. 581, 586-87 (1941). In Reid v. Colorado, 187 U.S. 137, 148, 23 S.Ct. 92, 47 L.Ed. 108, 114 (1902), the Court stated:

> It should never be held that Congress intends to supercede, or by its legislation suspend, the exercise of the police powers of the state, even when it may do so, unless its purpose to effect that result is clearly manifested.

A masterly and complete analysis of the preemption question raised by the federal wire tapping statute, 18 U.S.C. §2518, can be found in the dissenting opinion of United States v. Hall, 543 F.2d 1229, 1239-46 (9th Cir. 1976). See also People v. Conklin, 12 Cal. 3d 259, 114 Cal. Rptr. 241, 522 P.2d 1049 (1974) and cases cited therein, appeal dism. for want of subst. fed. question 419 U.S. 1064 (1974). The doctrine of preemption should not preclude application of the Washington statutes to the case at bar.

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Subsequent to filing the appeal to the Ninth Circuit in this case, the Washington State Supreme Court again discussed the State Privacy Act (R.C.W. 9.73 and 10.79) as it relates to contrary federal law. In State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980), the highest court in Washington, expressly held that interceptions and recordings made by federal agents are inadmissible in state court proceedings. The state Supreme Court further held that the state statute includes application to federal agents.

This issue, raising a potential conflict between state and federal law, is clearly before the Court in the instant case. Certiorari should be granted.

2. The Rico Issue

On appeal to the Ninth Circuit Court of Appeals, the petitioner joined in argument presented by co-defendants on the issue of the applicability of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §§1961-68 (1970) (known by the acronym "RICO", Racketeer Influenced and Corrupt Organizations) to the facts of this case. The petitioner contended that prosecution under RICO is appropriate only where racketeers are preying upon legitimate business enterprises; that RICO does not apply to individuals whose conduct is alleged to be wholly illegal. The petitioner's position has been adopted in at least three circuits. United States v. Turkette, 632 F.2d 896 (1st Cir. 1980); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), reh. en banc granted (1980) (The en banc opinion for Sutton has not yet been released.)

In the case at bar, the Ninth Circuit Court of Appeals relied on United States v. Rone, 598 F.2d 564 (9th Cir. 1979),

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cert. den. 100 S.Ct. 1345 (1980), and held that "an association formed for illicit purposes will satisfy the enterprise requirement" of the RICO statute. Supporting the Ninth Circuit position, but in contradiction to the First, Sixth and Eight Circuits, are recent cases from other circuits. United States v. Aleman, 609 F.2d 298 (7th Cir. 1979); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. den. 99 S.Ct. 2055 (1979); United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), reh. den. (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), cert. den. 429 U.S. 1039 (1977). But, in general, the circuits are split on this issue of statutory construction. The issue is ripe for a decision on this petition for certiorari.

18 U.S.C. Section 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt. (emphasis added.)

An "enterprise", defined in 18 U.S.C. Section 1961(4), includes:

> . . . any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Relying heavily on the legislative history of RICO as well as common principles of criminal law and statutory construction, the courts in Sutton, Anderson, and Turkette, supra, have held that the "enterprise" does not include "an illegal association that is proved only by facts which also establish the predicate acts constituting the 'pattern of racketerring activity'." Anderson, supra at 1363, 1372; accord Sutton, supra at 270 and Turkette at 899. The RICO statute was designed

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by Congress to prohibit interference with legitimate business enterprises by racketeers within the legitimate business itself. Turkette at 901. To interpret the enterprise requirement otherwise is to ignore the fact that mere racketeers and criminals can be prosecuted by different means, generally within the state systems. In referring to contrary holdings by other circuit courts, the First Circuit noted:

> We think the courts' natural antipathy to organized crime has clouded their perception of RICO, its purpose, and legislative history. What seems to be overlooked is that persons who participate in illegitimate enterprise will not escape punishment for their criminal activities if they are properly indicted and tried for these acts. Each act of racketeering . . . as well as conspiracy to commit such crimes, are already criminal acts under federal or state statutes, or both. We need not distort a statute in order to properly prosecute criminals. RICO was not enacted as an offensive weapon against criminals, but as a shield to thwart their depredations against legitimate business enterprises. Turkette, supra at 905-6.

This case brings to your attention the growing controversy among the circuits over interpretation of the RICO statute. The problem must be resolved, both in its application to the case at bar and to resolve the dissention among the circuits.

3. Mid-Trial Identification of Unindicted Co-conspirators

On appeal, the petitioner alleged that the prosecution's failure to disclose the names of all co-conspirators whose testimony or hearsay statements would be elicted at trial, was clear and prejudicial error.

Well into the trial and without any prior disclosure, the Government was permitted to add former-Pierce County Under

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Sheriff Carl Skagg and former Deputy Sheriff David Larson as unindicted co-conspirators. In this way, out-of-court statements made by the two men were admitted into evidence by hearsay declarations of others (under the co-conspirator exception to the hearsay rule). Neither Skagg nor Larson themselves testified.

The amended indictment did not refer to Skagg or Larson. Pre-trial the court had denied a defense motion for a bill of particulars, holding that the indictment was already "sufficiently detailed". However, at several points pre-trial, the Government did take the opportunity to produce names of other persons whose names were "unknown" at the time of the indictment by the grand jury. Neither Skagg nor Larson were ever mentioned.

On appeal, the petitioner contended that he was entitled to know the names of all alleged co-conspirators as soon as they became reasonably available. United States v. Smaldone, 484 F.2d 311, 320 (10th Cir. 1973); FED. RULES CRIM. PROC. 7. The indictment must be so complete as to allow the defendant to prepare his defense. United States v. Anderson, 532 F.2d 1218, 1222 (9th Cir. 1976). The Defendant cannot be mislead or unfairly surprised at trial by virtue of the contents of the indictment. United States v. Anton, 547 F.2d 493, 496 (9th Cir. 1976). In Williams v. United States, 289 F.2d 598 (9th Cir. 1961), the appellate court held that a trial court refusal to grant a bill of particulars is error when the defendant is actually surprised at the time of trial. Reversal is required if the defendant's substantial rights are prejudiced by denial of the bill.

In the case at bar, the petitioner was denied his due process right to prepare a defense in his own behalf. The petitioner was surprised by the testimony of the two Sheriff's

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Department employees. Being handed Jenck's materials on the afternoon before introduction of the decisive evidence was simply not sufficient opportunity to prepare cross-examination and rebuttal.

The appellate court should have remanded the cause.

4. Multiple Conspiracies and Severance

On appeal, the petitioner contended that, if anything, the evidence presented against him was sufficient only to raise a conspiracy separate and distinct from that with which he was charged. At the very least, the trial court should have instructed the jury on the issue of whether one or multiple conspiracies were raised by the evidence. United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979). Prior to trial, the petitioner had made a motion for severance which was denied.

The evidence adduced at trial showed that the petitioner spoke solely with an FBI Agent, known to the petitioner as "Mr. Johnson", regarding a new and very different operation. "Mr. Johnson" wanted to open up a cocktail lounge serving food; he wanted a new place, not then existing in Pierce County; he wanted girls to be involved; and he wanted to engage in high stakes gambling. All of these acts were to occur in the future. Each of "Mr. Johnson's" stated desires was in contradiction to the businesses owned by the co-defendants Carbone and charged under the Indictment. The existing taverns had licenses for beer and wine only and were not required to sell food.

To avoid or minimize the inherent prejudice involved in a mass trial, United States v. Kotteakos, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1957); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), reh. en banc granted (1980), the trial court should have instructed the jury on the issue of multiple

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conspiracies since a factual variance from the indictment was fairly raised. United States v. Elliott, 571 F.2d 880, 905 (5th Cir. 1978).

CONCLUSION

FOR THESE REASONS A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

RESPECTFULLY SUBMITTED:

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80-6309

APPENDIX

	Page
Opinion of the United States Court of Appeals for the Ninth Circuit, filed October 6, 1980	A-1
Order denying Mazzuca's petition and suggestion for rehearing en banc	A-50
Statutes	
28 U.S.C. §1254(1)	A-51
18 U.S.C. §1961(4)	A-51
18 U.S.C. §1962(c) and (d)	A-51
R.C.W. 9.73	A-52
R.C.W. 10.79	A-56
Rules	
Federal Rules of Criminal Procedure, Rule 7	A-57

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FILED

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD H. DEYLE
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOHN JOSEPH CARBONE, RONALD JOHN WILLIAMS, FRANK JULIUS MAZZUCA, GEORGE V. JANOVICH, JOSEPH M. CARBONE, RICHARD FRANCIS CALIGURI and LAMONT ARNOLD ZEMEK, Defendants-Appellants.	No. 79-1549 No. 79-1567 No. 79-1550 No. 79-1551 No. 79-1552 No. 79-1537 No. 79-1536 DC# CR-78-97T (Seattle) DC# CR-79-68M (S. F.)

OPINION

Appeal from the United States District Court
for the Western District of Washington
Morell E. Sharp, District Judge, Presiding
[Argued and Submitted August 11, 1980]

Before: WRIGHT and SNEED, Circuit Judges, and ENRIGHT, District Judge.*

WRIGHT, Circuit Judge.

Appellants attack the sufficiency of the evidence to support their convictions for a racketeering conspiracy and numerous substantive offenses connected therewith. They also assign error to designated instructions and evidentiary rulings. We affirm.

Count 1 of the seventeen count indictment charged fifteen confederates with conspiring over a seven-year period (1971 to 1978) to conduct the affairs of an "enterprise", the tavern business of Pierce County, Washington, through a pattern of racketeering. 18 U.S.C. § 1962(d).

The alleged racketeering activities included acts

*Of the District of Southern California

8

and threats of murder, arson and bribery (in violation of state law) and gambling, mail fraud, extortion and obstructing communication to criminal investigators (in violation of federal law). The remaining counts charged several defendants with these substantive federal crimes.

The seven appellants include the owners and operators of several taverns in Pierce County (John Carbone and his son, Joseph; Williams; and Mazzuca); an alleged "strong-arm" (Caliguri); a "middleman" (Zemek); and the "protector" (former Pierce County Sheriff Janovich). The indictment characterized John Carbone as the "leader" of the organization with Ron Williams as his "chief lieutenant."

Because appellants challenge the sufficiency of the evidence as to several counts, the evidence adduced at trial as to each count will be discussed separately. We view the evidence, as we must, in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Basey, 613 F.2d 198, 201 (9th Cir. 1979), cert. denied, 100 S.Ct. 1854 (1980).

FACTS

The mass arrests of defendants in November 1978 marked the culmination of a federal undercover operation begun in the fall of 1977. The investigation was prompted by a rash of arsons at Pierce County taverns and topless dancing establishments. Between 1972 and 1977 three taverns in which Williams, Mazzuca, John Carbone, and Joe Carbone had ownership or management interests were destroyed by fire. 1/ All were insured. There was evidence that, prior to

the fires, the establishments had been experiencing poor business. Thereafter, mortgages and debts were paid, the premises were remodeled or new establishments were opened nearby.

Between 1976 and 1978 seven suspected arsons also occurred at the establishments of competitors in the tavern, disco ord topless dancing business.[2/] Because local law enforcement officers were unsuccessful in apprehending the perpetrators, the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) began a joint investigation of the tavern fires with the sheriff's office in the fall of 1977.

By April 1978, evidence indicated Sheriff Janovich was providing information to a principal target (Williams). The ATF feigned abandonment of the investigation and dissolved the "partnership." Thereafter, the FBI and ATF conducted an undercover operation.

After his arrest in April 1978, defendant Michael Valentine agreed to cooperate with the ATF. Thereafter, the government recorded conversations between Williams and Valentine in which Williams admitted responsibility for arranging the attempted assassination of a state liquor control board supervisor responsible for policing Pierce County taverns for alcohol and topless dancing violations. In November 1977, the supervisor had been shot four times and seriously wounded.

At trial Valentine testified that he hired defendants Bentley and Johnson to execute the murder contract solicited by Williams. The government introduced evidence of motive. Three taverns in which Williams and the Carbones had

management or ownership interests received notices of topless dancing violations, entailing temporary closures in the months preceding the murder attempt. Williams, John Carbone, and Joe Carbone frequently expressed vitriolic dissatisfaction with the inspector's stringent enforcement activities.

Valentine was also instrumental in introducing undercover agents as Chicago "mobsters" whereby they were able to penetrate gambling activities at Mr. Lucky's and Stan & Ollies, taverns and cardrooms owned and managed by Williams and Mazzuca. Gambling included blackjack and pot limit poker games illegal under state law.[3/]

Posing as a potential buyer of Mr. Lucky's tavern and the related gambling activities, an agent was informed that a price could be negotiated to include the law enforcement protection arrangement with the sheriff's office. Mazzuca and Williams participated actively in these negotiations. Williams arranged an initial meeting between the "buyer" and Sheriff Janovich.

In 1976 the Internal Revenue Service (IRS) had initiated a criminal investigation of John Carbone and his activities. Carbone accused Jerome Weinstein, a former business associate, of informing to the IRS. Shortly thereafter, Weinstein's home suffered a series of firebombings and arsons. He was assaulted and seriously injured.

Concurrent with this undercover operation, agents consensually recorded conversations in an attempted extortion scheme involving John Carbone and Williams. John Carbone met with Weinstein soliciting $10,000 to be paid to Williams for protection against harassment. Weinstein agreed to cooperate

with the FBI and record conversations with Carbone.

In the fall of 1978 the FBI was also able to infiltrate a nascent plot to bomb a competitor's tavern. In the process of concluding the "sale" of Mr. Lucky's tavern to an undercover agent, Williams sought the "buyer's" help in locating a bomber to blow up the Night Moves tavern, a topless dancing establishment owned by Ron Chase.

The government introduced evidence that Night Moves provided the primary competition for Joseph Carbone's Flitter In. Night Moves had previously been the object of two arsons. In addition, in August 1978 Chase's home had been entered by an armed man subsequently identified as Caliguri who threatened the occupants with bodily injury unless Chase ceased operations.

The FBI arranged for an undercover agent to pose as the bomber. Williams set up the initial telephone contact, giving the number for Vista Auto Sales. John Carbone, Joe Carbone and Williams were observed listening for varying periods to this phone conversation. Caliguri met several times with the bomber to discuss details.

On November 28, 1978, at the time the final telephone contact was expected at Vista Autos, agents arrested John and Joe Carbone and Williams on the premises. The remaining defendants were apprehended the same day.

Six of the fifteen defendants pleaded guilty and testified at trial. Taped conversations between and among Valentine, Weinstein and undercover agents, on the one hand, and John Carbone, Williams, Mazzuca, Zemek, Caliguri and Janovich, on the other, formed an important part of the government's case.4/

After a three month trial, [5] the jury acquitted defendant Levage of all charges and returned guilty verdicts against the seven remaining defendants as to all counts in which they were named. The trial court imposed generally concurrent sentences and cumulative fines.[6]

RACKETEERING CONSPIRACY: COUNT I

Title IX of the Organized Crime Control Act of 1970 added Chapter 96 entitled, "Racketeer Influenced and Corrupt Organizations" (RICO) to Title 18 of the United States Code. RICO prohibits investment in, control, or operation of an "enterprise" through a pattern of racketeering activity. See 18 U.S.C. §§ 1961-1968. RICO defines "enterprise" somewhat ambiguously to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The definition of "racketeering activity" incorporates eight state crimes and twenty-four specified federal crimes. 18 U.S.C. § 1961(1). [7]

Finally, RICO requires a "pattern" of racketeering activity: at least two acts of racketeering committed within a period of ten years. 18 U.S.C. § 1961(5). The alleged pattern herein consisted of 29 predicate offenses involving, inter alia, multiple acts of arson, extortion and gambling.

Section 1962, the substantive portion of RICO, employs the foregoing definitions to create three offenses. See 18 U.S.C. § 1962(a)-(c). Pertinent to this appeal is subsection 1962(c) which prohibits any person employed by or

associated with an enterprise from conducting its affairs through racketeering activity.[8] Count I charged each appellant with a conspiracy to violate this subsection under 18 U.S.C. § 1962(d). The indictment alleged 107 overt acts in furtherance of this conspiracy.

Appellants raise three objections related to count one: (1) permitting application of RICO to defendants' activities; (2) failing to charge multiple conspiracies; and (3) insufficiency of the evidence.

1. RICO Enterprise

Appellants assert that their activities did not fall within the scope of the term "enterprise," a statutory element of the RICO offense. They argue that their alleged operations were wholly illegitimate, and therefore outside the purview of RICO which evinces Congressional concern with criminal infiltration of legitimate businesses.

This argument is unavailing in light of Ninth Circuit precedent to the contrary. Furthermore, ample evidence exists to negate appellants' premise that the enterprise in question was wholly illegitimate.

This circuit has rejected the argument that wholly illegitimate enterprises are outside the scope of RICO and has held that an association formed for illicit purposes will satisfy the enterprise requirement. United States v. Bone, 598 F.2d 564, 568 (9th Cir. 1979), cert. denied, 100 S.Ct. 1345 (1980). Although criticized,[9] this is the prevailing statutory interpretation.[10]

A few courts, notably the Sixth and Eighth Circuits, have refused to adopt the expansive definition. United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), submitted for rehearing en banc, April 2, 1980; United States v. Anderson, ___ F.2d ___ (8th Cir., Nos. 79-1809, 79-1827, August 7, 1980) (RICO requires discrete economic association separate from pattern of racketeering). Cf. United States v. Mandel, 415 F. Supp. 997, 1020 (D. Md. 1976) (pretrial order, not alleged as error on appeal).

Although Rone was decided prior to Sutton, other circuit courts addressing the issue thereafter have not followed the Sixth Circuit. See, e.g., United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert. denied, 100 S.Ct. 1345 (1980); United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980). See also, United States v. Provenzano, 620 F.2d 985, 992-93 (3d Cir. 1980). But see, United States v. Anderson, supra.

Even if the broader definition of "enterprise" adopted in Rone did not bind this panel, the charged enterprise satisfies the narrower definition of a group "organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized." United States v. Sutton, 605 F.2d at 264. The concern of the Sutton majority and of commentators is that the enterprise concept not be extended to include a loosely confederated group of criminals who perform unrelated criminal acts. See Note, Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO, 65 U. Va. L. Rev. 109, 119, n. 68 (1978). This is not such a case.

Certain appellants owned or operated more than six taverns in Pierce County during the relevant period. Organized and acting for ostensibly lawful purposes, they undertook to discourage competition and law enforcement investigation through arson, extortion, and physical violence. Further, they used a legitimate business as an alleged "front" for illegal gambling. This is precisely the type of operation Congress intended to encompass within the enterprise concept. See United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979) (restaurant used as a front for narcotics operations).

2. Multiple Conspiracies

Appellants assert that while count 1 alleged but a single conspiracy, the evidence adduced at trial established two separate conspiracies resulting in a variance affecting their substantial rights. See Kotteakos v. United States, 328 U.S. 750 (1946); Berger v. United States, 295 U.S. 78, 82 (1935).

John Carbone contends: (1) the incidents involving Jerome Weinstein (overt acts 4-5, 10-11, 15, 28, 51-55, 59-61, 65-67, 75, 79, 82, 87-93, 99) constitute a conspiracy independent of the tavern-related crimes; (2) the evidence adduced at trial as to Carbone's participation related only to the "Weinstein matter"; and (3) it was prejudicial error to try him for a single conspiracy.

The recurrent issue of multiple conspiracies involves questions of severance, variance, and misjoinder which restate the basic contention that the evidence proved

several separate conspiracies. United States v. Jabara, 618 F.2d 1319, 1327 (9th Cir.), cert. denied, 100 S.Ct. 2973 (1980). The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. See United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir.), cert. denied, 434 U.S. 971 (1977). Performance of separate crimes or separate acts in furtherance of a conspiracy is not inconsistent with a "single overall agreement." United States v. Friedman, 593 F.2d 109 (9th Cir. 1979). The general test also comprehends the existence of subgroups or subagreements.

Appellants assert there was no connection between the harassment and extortion of Weinstein and the "larger" conspiracy to control the tavern business in Pierce County. It was the government's theory that Weinstein was an enterprise target because he was believed to have been an IRS informant.

As Weinstein's former business associate, John Carbone was in the best position to know what incriminating evidence Weinstein possessed as to Carbone operations. IRS scrutiny could expose the extent of Carbone's financial interests in various enterprise operations and jeopardize enterprise profits. As the alleged "head" of the enterprise, John Carbone might indeed fear a federal tax investigation.

Several circuits have applied a "factors" analysis to distinguish single from multiple conspiracies. See, e.g., United States v. Cambindo-Valencia, 609 F.2d 603, 623-25 (2d Cir. 1979), cert. denied, 100 S.Ct. 2163 (1980); United States v. Becker, 569 F.2d 951, 960 (5th Cir.), cert. denied, 439 U.S. 865 (1978). Relevant factors include the nature of the

scheme; the identity of the participants; the quality, frequency and duration of each conspirator's transactions; and the commonality of time and goals. A single conspiracy can be identified here either by isolating various elements under the "factors" analysis or by aggregating evidence under the "single agreement" test.

The nature of the instant scheme was to operate and control enterprise taverns and related activities with minimal interference from law enforcement agencies. This entailed numerous actions to protect illegal activities (e.g., unauthorized topless dancing and gambling) from law enforcement scrutiny. It engendered a pervasive concern regarding investigation by the state liquor board, the ATF, and the IRS.

The potential threat posed by local law enforcement officials was minimal because the sheriff had been successfully bribed. As Williams related to an undercover agent, the only investigators to fear were the IRS or the "feds."

Throughout this period, John Carbone insisted that Weinstein had provided or would provide the IRS with information. He indicated to Weinstein his belief that law enforcement efforts could not succeed without a "stoolie." The harassment activities against Weinstein confirm that he acted upon this belief.

Continuation of enterprise activities was dependent upon concealment. The operations were particularly vulnerable to federal investigation. The so-called "Weinstein matter" was not merely a separate, personal vendetta by John Carbone.

The use of violence to stifle law enforcement efforts was a common denominator. When the state liquor inspector became persistent, a murder attempt was orchestrated. Similarly, a brutal assault was arranged because Weinstein was a perceived threat.

Threats, arson, and extortion were employed against Weinstein, as well as enterprise competitor, Ron Chase. It is undeniable that the Weinstein matter and the tavern conspiracy had overlapping participants. Williams solicited Valentine's services for arson and assault contract procurement in both. Zemek, Levage, and Wilcox were also common participants in arson activities. The evidence revealed a continuing relationship among participants organized in a hierarchical pattern.

The allegedly separate conspiracies were also united in time and place. Count 1 charged a conspiracy from 1971 to November 1978. The attacks upon Weinstein occurred from 1976 to November 1978, within the time span of the conspiracy and during the time when other crimes were occurring (for example, the plot to blow up the competing Night Moves tavern). The Weinstein harassment activities promoted the overall goal of the conspiracy by discouraging cooperation with law enforcement officials and providing an object lesson to minions within the enterprise.

The activities were consistent with one overall agreement to control and manipulate taverns and related illegal activities in Pierce County. The unity of time and place, the common identity of participants, the similarity of method and purpose combine to provide a rim sufficient to connect the various spokes of a single conspiratorial wheel.

Having reviewed the record with care, we conclude that there was no variance between the allegations of the indictment and the evidence presented. Thus, the refusal of the trial court to instruct on multiple conspiracies caused no prejudice and is not reversible error. United States v. Perry, 550 F.2d 524, 533 (9th Cir.), cert. denied, 434 U.S. 827 (1977). The court's instructions were sufficient. See United States v. Kearney, 560 F.2d at 1363.11/

As an alternative or supplemental argument in support of its single conspiracy theory, the government asserts that even if a single conspiracy cannot be identified under traditional analysis, the enterprise concept in RICO supplants conventional conspiracy doctrine and defeats appellants' multiple conspiracy objections. Because a single conspiracy can be identified using traditional conspiracy analysis, we need not determine if RICO permits a joint trial of otherwise non-joinable conspiracies.12/

3. RICO Conspiracy

a. Admission of Co-Conspirators' Statements

Before examining the sufficiency of the evidence, we meet appellants' objections to the receipt in evidence of co-conspirators' statements. Statements by one co-conspirator during the course and in furtherance of a conspiracy are admissible as vicarious admissions against another co-conspirator. See United States v. Sandoval-Villalvazo, 620 F.2d 744 (9th Cir., 1980). Admission of a co-conspirator's statement is predicated upon independent

proof of defendant's participation, however. See Fed.R.Evid. 801(d)(2)(E).

Two objections are raised here. First, Janovich argues that a pretrial determination of admissibility is required. Second, John Carbone asserts there was insufficient prima facie proof of his involvement, independent of the co-conspirators' statements.

The district court provisionally admitted the co-conspirators' statements subject to establishing the requisite independent proof. Thereafter, it expressly found that a prima facie case of involvement had been established as to the appellants. Janovich argues that a pretrial determination of admissibility is required.

This court has held repeatedly that the order of proof is within the sound discretion of the trial court. United States v. Sandoval-Villalvazo, supra. The procedure of conditionally admitting co-conspirator's statements subject to later motions to strike is well within the court's discretion. United States v. Batimana, 623 F.2d 1366, 1369 (9th Cir, 1980). Finding no abuse of discretion, we uphold the court's provisional admission of the statements. 13/

The test for admission of co-conspirators' statements is whether there is "sufficient, substantial evidence" apart from them to establish a prima facie case of conspiracy and defendant's slight connection therewith. United States v. Weiner, 578 F.2d 757, 768-69 (9th Cir.), cert. denied, 439 U.S. 981 (1978). Although John Carbone does not challenge the existence of a conspiracy, he does assert there was insufficient independent evidence linking him to the conspiracy.

Carbone's own taped conversations with Weinstein provide the primary evidence linking him to specific activities of the conspiracy. Therein, Carbone admitted his experience in providing "protection" and using muscle; his "control" of Williams; his familiarity with gambling operations; and his transactions with persons he described as "Mafia". His recorded conversations indicated he had observed the assault upon Weinstein.[14/] He offered no explanation by evidence or argument for these admissions.

Carbone's reliance upon United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied, 100 S.Ct. 1345 (1980) is misplaced. The Fifth Circuit found that absent the statements of co-conspirators, the case against Diecidue was "built of supposition on a foundation of inference." 603 F.2d at 555. Carbone's taped statements provide a direct link to his involvement in controlling taverns and his personal role in the related extortion of Weinstein. The government established the requisite connection to permit admission of co-conspirators' statements.

b. Sufficiency of Evidence

John Carbone, Joe Carbone, Zerilli, Caligiuri, and Janovich challenge directly the sufficiency of the evidence under Count 1.[15/] Once the facts are established, viewed in the light most favorable to the government, the test for sufficiency is whether jurors could reasonably decide to act in their own serious affairs on factual assumptions as probable as the conclusion the defendants were guilty beyond a reasonable doubt. United States v. Price, 623 F.2d 587, 591 (9th Cir. 1980).

In measuring a conspirator's complicity, the court must decide if there was sufficient evidence to conclude: (1) the charged conspiracy existed; (2) defendant had at least a "slight" connection therewith; and (3) defendant knew he was connected with the charged conspiracy. United States v. Smith, 609 F.2d 1294, 1297 (9th Cir. 1979). Appellants focus upon the final element. The evidence against each will be reviewed individually.

John Carbone's primary argument is that he had retired from the tavern and bail bonding businesses and his only business interest during the relevant period was Vista Auto Sales. There is a significant body of credible, circumstantial evidence that he retained both financial and personal control of several enterprise operations. As discussed above, the most damaging evidence against him was his own taped statements to Weinstein intimating his involvement in illegal activities. Carbone also told of "unloading" money on politicians with the tacit understanding that help would be forthcoming when needed.

Carbone claimed that Janovich would do anything he wished. He bragged that Williams "performed" for him and had made him a millionaire. In taped conversations, Zemek and Williams indicated they perceived Carbone as their superior. There was evidence Williams frequently visited Vista Autos, often prior to making business decisions. John Carbone met privately with Williams and Janovich several times at the office of his attorney.

In April 1977, a disco restaurant in competition with an enterprise operation was destroyed by fire. Carbone's attorney testified that when co-defendant Bevage attempted to retain him to defend arson charges in state court, he was told that John Carbone and William[illegible] would pay the fee.

Vista Autos, an acknowledged Carbone operation, served as the communication center for the planned bombing of Night Moves. John was observed listening to the crucial phone conversation with the bomber for a short time. A few hours later he was observed leaving Joe Carbone's Flitter In accompanied by Williams who carried the identifying signal requested by the bomber.

Carbone does not challenge the evidence as to the Weinstein extortion, relying upon his multiple conspiracies argument rejected above. The record does not support his assertion that there was no evidence against him except as to the Weinstein counts. There was abundant evidence of his connection with the conspiracy revealing his role as a financier and overseer of the enterprise.

Joseph Carbone asserts that he and Williams were "mere associates" and he was not involved in the plots and schemes attributable to Williams. The relationship between Williams and Joe was more than a mere association. Both were insured together for two establishments, Flitter In and Back Door Disco. Williams referred to Joe as his "partner" in topless clubs.

Prior to taking retaliatory actions against a competitor, Williams stated he asked Joe to verify that the "target" did not operate under the protection of an alleged Mafia figure in an adjoining county. John Carbone frequently referred to "Joe and Ron [Williams]" when speaking to Weinstein about his business affairs. We reject Joe Carbone's "mere association" argument.

The government produced evidence of Joe's involvement in "torching" a tavern owned by his father which was experiencing bad business.[16/] His topless dancing operation, the Flitter In, was in direct competition with Night Moves. There was ample evidence of his involvement in the bomb plot against Night Moves. We find sufficient evidence from which the jury could conclude beyond a reasonable doubt that Joseph Carbone was a knowing member of the conspiracy.

Zemek characterizes the evidence against him as merely indicative of associational ties with the primary actors. He dismisses his taped admissions as "drunk talk" and false bravado. His intimate knowledge of many details belies this purported defense.

On tape Zemek admitted involvement in a firebombing of the Night Moves tavern and his responsibility for one fire at Weinstein's residence. He told of taking money to co-defendant Levage, imprisoned on a state conviction for burning a competing disco.

Zemek solicited Valentine to set fire to a tavern which Williams and he had been unable to acquire. There was sufficient evidence to permit an inference that he was then working for the enterprise.

The Fourth Circuit has said that the "conduct or participate" language in § 1962(c) requires proof of involvement in the operation or management of the RICO enterprise. See, e.g., United States v. Mandel, 591 F.2d 1347, 1375 (4th Cir.), rev'd on other grounds, 602 F.2d 653 (1979) (en banc) cert. denied, 100 S.Ct. 1647 (1980).

Zemek's assertion that he was unaware of the scope of the enterprise and did not agree to conduct its affairs ignores his active participation and his solicitation efforts. That he knew the structure of the organization is clear from his statement that Williams was owned or controlled by "Dagos", an admitted reference to the Carbones, particularly John. There was ample evidence of Zemek's participation and involvement in the operation of the enterprise.

Caliguri asserts the evidence did not establish that he was a knowing member of the conspiracy. He was identified as the masked intruder who broke into the home of competitor Ron Chase and threatened the occupants if the Chases continued their topless dancing business. He was also identified as the person who tailed Chase.

There was evidence that Caliguri executed Joe Carbone's order to "do something about" an enterprise tavern experiencing bad business. Shortly after that directive, the tavern was destroyed by fire. Caliguri was also active in the plot to blow up Night Moves. When he was arrested, agents found a shaving kit in Caliguri's car containing his gun and the home phone numbers of John and Joe Carbone and Williams. The evidence established Caliguri was a knowing and willful conspirator.17/

Sheriff Janovich strenuously asserts that he was but an acquaintance of the principals herein. The evidence showed a long-term relationship between John Carbone and Janovich. John Carbone's attorney testified to several meetings between Janovich, Carbone and Williams at his office. Janovich arranged an introduction and meeting

between John Carbone (ostensibly retired) and the jail superintendent of an adjoining county to discuss expanding the Carbone bail bond business. Carbone bragged of his control over Janovich.

In 1976 Janovich arranged a meeting between Willians and an assistant attorney general directing the state's organized crime unit. On tape, Williams revealed that Janovich had warned him of federal "heat" in the spring of 1978.

The indictment assigned Janovich both protection and harassment roles. There was some evidence of his involvement in an "emphasis patrol" of an enterprise competitor, culminating in visits by fifteen law enforcement personnel within a thirty-minute period. The government presented circumstantial evidence of Janovich's efforts to stifle arson investigations. On tape Williams suggested that if business were poor, a tavern could be "torched" and the sheriff would limit investigation.

The most damaging evidence against Janovich was taped conversations regarding the protection aspect of the conspiracy. Therein he acknowledged his awareness of a warning system and his intent not to interfere in illegal gambling operations. That a price was exacted for such cooperation is clear. One gambling operator at an enterprise tavern testified that Janovich pocketed a $100 payment which the "donor" intended for protection. Janovich also accepted $1,300 from the undercover agent posing as the buyer of Mr. Lucky's.

Janovich testified that he accepted these payments as campaign contributions yet they were not reported on campaign disclosure forms. Indeed, no record was made of their receipt. The jury could reject his explanation as implausible. See United States v. Young, 573 F.2d 1137, 1139 (9th. Cir. 1978) (it is the exclusive function of the jury to weigh the credibility of witnesses). Janovich's actions were those of a "knowing participant." See United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980) (county attorney agreed to give advance notice of raids to prostitution ring in return for cash payments and free services).

There was sufficient evidence to support the conviction of each appellant under count 1.[18] We now examine the other challenged counts.[19]

HOBBS ACT

Count 6 charged Zemek, Caliguri, John and Joe Carbone and Williams with violating 18 U.S.C. § 1951 by attempting to obstruct interstate commerce by extortion to obtain the goodwill and customer revenues of a competing tavern, the "Night Moves", owned by Ron Chase. The elements of a Hobbs Act violation are extortion and a nexus with interstate commerce. Stirone v. United States, 361 U.S. 212 (1960).

Extortion is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). The alleged forceful acts include damaging the tavern with a Molotov cocktail in November 1977; destroying Night Moves' [illegible]

February 1978; tailing the owners of the tavern; breaking into their home and threatening the occupants in August 1978; and plotting to blow up the tavern in November 1978.

Zemek, Caliguri and Williams argue no violation was established because: (1) no "property" was obtained or sought; (2) no wrongful inducement was employed; and (3) the Chases did not consensually yield any property. All five appellants argue the evidence was insufficient.[20/]

1. Intangible Property

The concept of property under the Hobbs Act has not been limited to physical or tangible "things." The right to make business decisions and to solicit business free from wrongful coercion is a protected property right. See, e.g., United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979) (right to make business decisions free from outside pressure wrongfully imposed); United States v. Nadaline, 471 F.2d 340 (5th Cir.), cert. denied, 411 U.S. 951 (1973) (right to business accounts and unrealized profits); United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970) (right to solicit business free from territorial restrictions wrongfully imposed by competitors). Cf. United States v. Hathaway, 534 F.2d 386, 395 (1st Cir.) cert. denied, 429 U.S. 819 (1976) (rejection of narrow perception of "property"); Battaglia v. United States, 383 F.2d 303 (9th Cir. 1967), cert. denied, 390 U.S. 907 (1968) (right to lease space in bowling alley free from threats).

The trial court instructed the jury using the following language from United States v. Tropiano, supra, 418 F.2d at 1075: property includes "any valuable right considered as a source or element of wealth". No exception was noted. Chase's right to solicit business free from threatened destruction and physical harm falls within the scope of protected property rights under the Hobbs Act.

2. Coercion

It is difficult to view the acts directed against the Night Moves and its proprietor as non-coercive. Threatened force may encompass fear of economic loss as well as physical violence. See Instruction No. 36. Cf. United States v. Gates, 616 F.2d 1103, 1106 (9th Cir. 1980) (inducing payments to avoid county business tax).

Appellants expressly communicated their purpose when a man, later identified as Caliguri, broke into the Chases' home, bound the occupants, and threatened to kill them if they did not give the Chases a message to "leave town." He warned that it was futile to reopen Night Moves because it would "come down again". The Chases had rebuilt the tavern after it was destroyed by a fire arranged by Williams in February 1978.

3. Consent

Appellants' argument that the convictions must be reversed because Chase was not induced to give up property "with his consent" ignores the fact that count 6 charged attempted extortion. The jury was so instructed.

To prove the substantive act of attempted extortion there must be proof of an attempt to instill fear. Carbo v. United States, 314 F.2d 718, 741 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964). Evidence of the previously described acts of intimidation and violence suffices. Appellants' objective was to induce Chase to give up a lucrative business. The fact that their threats were unsuccessful does not preclude conviction.

4. Criminal Liability

On this and other substantive counts, the indictment charged liability as an aider and abettor and as a principal. 18 U.S.C. § 2. The jury was instructed on the complicity theory. Conviction as an aider and abettor requires proof the defendant willingly associated himself with the venture and participated therein as something he wished to bring about. See United States v. Groomer, 596 F.2d 356 (9th Cir. 1979). A review of the record reveals substantial evidence that appellants associated with and participated in the efforts against Chase.

John Carbone's primary connection to the Night Moves plot involves the November 1978 scheme to blow up the tavern. Vista Autos was the site of a crucial phone conversation with the bomber. The bomber discussed his demands, and requested the "contact" carry a paper bag for identification. John was present and listened briefly. A few hours later he was observed leaving Joe Carbone's Flitter In with Williams. Williams was carrying the requested paper bag. When Caliguri was arrested at a rendezvous with the

bomber, agents found notes with the home phone numbers of John and Joe Carbone and Williams.

Ron Chase testified that Joe Carbone's Flitter In and Night Moves were two of only four topless dancing taverns in the county. The two remaining operations were also owned by Carbone. Carbone and Chase directly competed for dancers and customers. Joe Carbone and his sometime employee, Caliguri, visited the Night Moves after it opened. Caliguri was in Joe's employ when he tailed the Chases and broke into their home. Joe entered Vista Auto's office during the crucial phone conversation and listened to the final minutes. His home phone number was also found on Caliguri.

Caliguri was seen tailing the Chases in a Vista Autos car, even though he was not at that time employed by the dealership. He was identified at trial as having entered the Chases' home and threatened its occupants. He was arrested while serving as a go-between in the November 1978 bombing plot.

On tape Zemek admitted involvement in the Molotov cocktail incident at Night Moves. In a taped conversation he revealed his awareness of the Chases rebuilding efforts after the February 1978 arson and of the efforts to drive Chase out of business.

Williams asked Valentine to arrange for the arson of Night Moves because it drew business from Mr. Lucky's. Co-defendant Bentley admitted setting the fire. Before soliciting the arson, Williams indicated he had asked "Joe" to make sure Chase did not operate under the protection of a well-known nightlife figure in the adjoining county. In

November 1978 Williams solicited help from an undercover agent in finding a bomber to destroy Night Moves.

This evidence more than satisfied the government's burden to prove active participation and willful association as to Zemek, Caliguri and the Carbones. The government established compelling evidence of Williams' participation as a principal in soliciting arson and arranging a bombing.

OBSTRUCTING COMMUNICATION TO A CRIMINAL INVESTIGATOR

John Carbone and Williams were charged under 18 U.S.C. § 1510 with willfully endeavoring to obstruct communication of information relating to criminal violations, by attacking the property (count 7) and person (count 8) of Jerome Weinstein, the person they believed had given information to the IRS. Zemek was also charged under count 7.

Although the IRS had conducted a criminal investigation of John Carbone, Weinstein had not, in fact, been its informant. In January 1977 John Carbone was notified that the IRS investigation had concluded. Certain alleged acts of violence directed at Weinstein occurred thereafter.

Appellants assert these acts do not fall within the statutory proscription of 18 U.S.C. § 1510 because (1) Weinstein was not in fact an informant; (2) retaliatory acts are not proscribed; or (3) the statute does not cover threats or injuries inflicted after an investigation has terminated.

18 U.S.C. § 1510(a) provides:

> Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prev the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

> Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator --
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The statute has been construed as requiring proof of specific intent. United States v. Carleo, 576 F.2d 846 (10th Cir.), cert. denied, 439 U.S. 850 (1978). While the first two paragraphs of § 1510(a) are phrased disjunctively, the indictment and jury instructions in this case were phrased conjunctively (i.e., the government must prove willful endeavor to obstruct communication and injury "on account of" giving information).

1. Identity of Informant

The identity of the actual IRS informant in 1976 is unknown. Carbone knew Weinstein had information of interest to the IRS and believed he had informed in the past. The government introduced ample evidence of the requisite mens rea supported by several corroborating acts.

Legislative history is silent regarding the necessity of proving a defendant had actual knowledge that an alleged informant had transmitted or would transmit information. The Third Circuit, relying on case law construing similar statutes, has held actual knowledge is not required and a "reasonably founded" belief will suffice. See United States v. Kozak, 438 F.2d 1062 (3d Cir.), cert. denied, 402 U.S. 996 (1971). See also, United States v. San Martin, 515 F.2d 317 (5th Cir. 1975) (defendant knew or "reasonably believed" person had information).

The jury instruction in this case asked whether defendants knew or believed Weinstein was about to give information and had given information in the past. No exception was taken. The jury was also instructed that a mere threat of force unrelated to the communication of information would not violate the act. The jury was adequately instructed. Appellants did not need to succeed in their efforts to prevent or delay communication of information. The statute speaks of "endeavors."

2. Retaliatory Acts

We reject appellants' argument that their convictions must be reversed because the statute does not proscribe retaliatory acts. Threats and intimidation may serve two purposes: (1) deterring future communications; or (2) retaliating for past communications. United States v. Koehler, 544 F.2d 1326, 1329 (5th Cir. 1977). While threats intended to thwart future communications clearly will support a conviction under § 1510, United States v. Koehler, supra, the Fifth Circuit has held that retaliatory threats will not support conviction. United States v. San Martin, 515 F.2d at 320.

The present record provides a basis to infer that appellants' purpose in attacking Weinstein was to deter future communications. Weinstein still posed a threat to Carbone. He had financial information of potential interest to the IRS. The IRS maintained a continuing interest in John Carbone. Carbone believed information was or was about to be given.

The evidence supports an inference that one purpose was to interfere with future communication of information. Thus, even were we to apply the Fifth Circuit's distinction between retaliation and deterrence, the convictions may be sustained. 21/

3.. Termination of Investigation

It is not fatal that the IRS investigation terminated in January 1977, prior to the alleged acts and threats of violence. Section 1510 does not require "an investigation be taking place" concurrently with the proscribed acts. See United States v. Lippman, 492 F.2d 314, 317 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975). The statutory focus is upon an endeavor to prevent communications to federal investigators. 22/.

4. Sufficiency of the Evidence

Neither Williams nor John Carbone directly challenge the sufficiency of the evidence. There was ample evidence as to Williams' complicity. He hired Valentine to set fire to Weinstein's house in May 1978, offered Valentine an assault contract on Weinstein in 1978, and accepted money for protection. Relying entirely on his multiple conspiracies analysis rejected above, John Carbone does not challenge the sufficiency of the evidence as to the counts involving Weinstein.

Zemek was charged under count 7 which alleged damage to Weinstein's property. In taped conversations, Zemek admitted responsibility for arranging a fire of Weinstein's garage door in March 1977. He said the attacks were made

because Weinstein was an informant "on some tax deal." There was enough evidence that Zemek was aware of the relationship between the arson and Weinstein's perceived position as a "stoolie" to support his conviction as an aider and abettor.

ILLEGAL GAMBLING BUSINESS

John Carbone, Williams and Mazzuca were charged with operating an "illegal gambling business" in violation of 18 U.S.C. § 1955. Count 9 involved pot limit poker and count 10 involved blackjack. Count 11 charged them and Janovich with a concurrent conspiracy to obstruct state law enforcement to facilitate this gambling business. 18 U.S.C. § 1511. Appellants object to the trial court's instruction defining "gross revenue" and Mazzuca, Carbone and Janovich challenge the sufficiency of the evidence as to specified counts.

1. Gross Revenue

Both 18 U.S.C. § 1955 and § 1511 require that an illegal gambling business: (1) violate state law; (2) involve five or more persons; and (3) operate substantially continuously for more than 30 days or have gross revenue of $2,000 in any single day. Mazzuca and Janovich question the government's proof of the $2,000 gross revenue option of the third requirement.[23/]

The district court's instruction defined gross revenue as "the total amount of money wagered in a single day not restricted to net profit." Appellants do not contend gross revenue should be equated with net profit. [24/]

Rather, they object to the court's refusal to give a proposed instruction containing this caveat: gross revenue does not include "side bets among players or wagers placed in a common pot." We find no error in the trial court's instruction in light of the evidence.

Courts discussing and rejecting the proposition that gross revenue is restricted to net profit broadly define gross revenue as "the total amount wagered" and do not differentiate between wagers placed against the house and wagers among players. See, e.g., United States v. Rotchford, 575 F.2d 166, 174 (8th Cir. 1978); United States v. Sacco, 491 F.2d 995, 1001 (9th Cir. 1974 ; United States v. Ceraso, 467 F.2d 653, 656-57 (3d Cir. 1972).

Apparently no court has expressly determined if "gross revenue" excludes side bets.[25/] In United States v. Graham, 534 F.2d 1357 (9th Cir. 1976), this court suggested that side bets may be excluded from the gross revenue computation. There, as here, however, the record indicated that money was indeed wagered against the house.

The government offered testimony that the house had an interest in all amounts bet at the pot limit poker game: a dollar per pot charge plus a percent of each pot. House dealers would "rake off" the pot. The operation also provided dealers for blackjack and used shills to increase the ante in blackjack and poker games. Their winnings were returned to the house.

No evidence was introduced as to side-betting among or between the players.[26/] The court properly instructed the jury and did not err in refusing to give appellants' proposed instruction.

Mazzuca also challenges proof of $2,000 gross revenue as to count 10 (blackjack). Agent Transeth, an accountant, observed the action and conservatively estimated $4,000 bet in two hours. An undercover agent may observe and testify to the action. Cf. United States v. Graham, supra. The record provides sufficient foundation for the estimate. In addition, Williams bragged that $2,000 profit was possible on a good night. Finally, one of the operators testifed to action of "a couple thousand" per night.

2. Black Jack and Pot Limit Poker

Neither Mazzuca nor Williams challenge the sufficiency of the evidence to convict under counts 9 and 10. Both had ownership interests in Mr. Lucky's. Both approached an operator to set up "after hours" pot limit poker games and blackjack games; and both promoted the sale of Mr. Lucky's with the illegal gambling operations.

John Carbone frequently bragged of his profitable relationship with Williams. It is permissible to infer that he referred to on-going ventures in which Williams "performed" for him. John Carbone related to Weinstein that he had a proprietary interest in the illegal gambling business which Williams and Mazzuca operated in the rear of Stan & Ollie's.[27/]

Surveillance agents observed Williams consulting with John Carbone before making major decisions. Williams excused himself midway through a preliminary discussion regarding the sale of Mr. Lucky's. He drove to John Carbone's Vista Autos and briefly conferred. Upon his return to Mr. Lucky's, Williams invited the undercover agents to an illegal blackjack game to be held that evening.

In light of this evidence and other circumstantial evidence of Carbone's active role, albeit behind-the-scenes, we cannot say that the evidence was insufficient to establish his complicity in the gambling operations.

3. Conspiracy to Facilitate Illegal Gambling

Mazzuca, Janovich, and John Carbone challenge the sufficiency of the evidence under count 11 charging violation of 18 U.S.C. § 1511 which proscribes a conspiracy to obstruct state law enforcement with intent to facilitate an illegal gambling business.[28/] We find sufficient evidence of the existence of a conspiracy and appellants' connection and knowing participation therein.

The government introduced tape recordings in which Mazzuca told the agent posing as a buyer of Mr. Lucky's that he and Williams would provide introductions to political figures who could guarantee no prosecutions or arrests for illegal gambling. Discussions of the protection aspect of the gambling business ensued. When a gambling operator complained about the necessity of "contributing" $100 to Janovich, Mazzuca said he had given $300. In a meeting with the undercover agent, Janovich expressed satisfaction that Mazzuca would remain at Mr. Lucky's after the sale. Mazzuca's argument that he was not a knowing participant is rejected.

Janovich asserts that the evidence established only a "mere association" with co-defendants and that his acceptance of money from the undercover agent established a separate conspiracy.

There was ample evidence that Janovich agreed to provide protection for the gambling operations as well as to harass would-be competitors. See United States v. Panzanella, 416 F. Supp. 68 (W.D. Pa. 1976). His role in facilitating the gambling operation was established by testimony and his taped statements.

One operator testified that Williams assured him of protection from arrest because the sheriff was "in his hip pocket." If a raid was planned, they would receive two-hour advance notice. Taped statements by co-conspirator Williams refer to the sheriff's complicity. Williams arranged the initial meeting between Janovich and the agent posing as a buyer of Mr. Lucky's. Williams solicited $300 from the agent to be passed to Janovich. After the meeting, Williams reported that the sheriff would do business but wanted money "right away" without any "heat." At the second meeting, Janovich acknowledged receipt of the first payment. He accepted $1,000 cash from the agent at this meeting.

Janovich's familiarity with the warning system and his intent not to enforce gambling laws to the detriment of enterprise operations were apparent in taped conversations. The evidence showed he was a member of the conspiracy to obstruct state gambling laws, as opposed to merely knowing and associating with the co-conspirators. See United States v. Crockett, 514 F.2d 64, 75 (5th Cir. 1975). His dealings with the agent did not form a separate conspiracy, but were acts in furtherance of a continuing conspiracy by inducing the "buyer" to become a new participant.

The government contends that John Carbone's role in the gambling protection conspiracy is confirmed by his relationship with Williams, his experience in providing protection, and his frequent solicitations for money for the sheriff's office to promote his "program."

Carbone told Weinstein that his business required that he give large amounts of money to politicians with the tacit understanding that help would be available. He bragged of his experience in arranging protection, insulating himself by dealing two or three people away.

Carbone regularly held meetings at his attorney's offices attended by Williams, Janovich and two of the sheriff's ranking subordinates. He told Weinstein the sheriff had removed a detective from active duty because he was "nosing around" too much. He frequently pressured his attorney for contributions to maintain his "program" with the sheriff's office.

The evidence was sufficient to show Carbone's connection to the conspiracy.

MAIL FRAUD

Counts 15 through 17 involve the October 1977 arson at an enterprise tavern, the Black Knight, and an alleged scheme to defraud insurance companies necessitating use of the mails.[29/] John and Joe Carbone and Caliguri were convicted under these counts. All challenge the sufficiency of the evidence.

The essential elements of mail fraud are a scheme to defraud and knowing use of the mails to execute that scheme. Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Beecroft, 608 F.2d 753 (9th Cir. 1979).

No one asserts that a plan to deliberately set a business on fire to obtain insurance proceeds would not constitute a scheme to defraud. Nor is it argued that mailing of the proceeds was insufficiently related to the scheme to defraud.

Appellants do challenge the sufficiency of the evidence to establish their participation in or knowledge of the mail fraud scheme. Appellants' intent can be inferred from their statements and conduct, United States v. Beecroft, 608 F.2d at 757, and from their knowledge that the scheme operated in a deceitful manner. United States v. Piepgrass, 425 F.2d 194, 199 (9th Cir. 1970).

There was evidence that John Carbone, not his son Richard, was the actual owner of the Black Knight. Williams borrowed money for the initial purchase in 1974. Thereafter John Carbone obtained a loan using the proceeds to pay Williams. Although Richard co-signed the note, John was the sole signatory on renewals.

The Black Knight was located in the Pierce County town of Puyallup and was its only topless dancing establishment. It shared topless dancers with Joe Carbone's topless clubs. Indeed, Joe often gave advice to the manager.

In June 1977, insurance on the tavern's contents was increased from $35,000 to $65,000 purportedly at Williams' request, although the authenticity of the signature is questioned. The government introduced evidence that business at the Black Knight was slack. Joe Carbone was planning to open a new topless tavern in Puyallup in the fall of 1977.

One of Joe Carbone's dancers testified that she overheard a conversation between Joe and Caliguri two weeks before the fire in which Joe stated that business was bad at the Black Knight and asked Caliguri to "take care of it."

Three days before the fire, the tavern received a notice of violation for lewdness which could have required a temporary closure.

The tavern was destroyed by fire on October 30, 1977. Fire investigators eliminated all possible accidental causes. One week later Joe Carbone opened his new topless tavern in Puyallup.

Richard Carbone, the nominal owner of the Black Knight, took little interest in the fire or its aftermath. By contrast, John Carbone asked the insurance adjuster for fast action on the claim. Williams made several calls to the insurance company "for John." The proceeds, totalling $33,000, were used to pay John's note for the purchase.

There was sufficient proof of John Carbone's financial interest in the tavern and the insurance proceeds. There was evidence to support the government's theory that Joe ordered the arson, motivated by the tavern's poor business and his plans to open a new topless tavern nearby. Evidence of motive and opportunity was abundant. The method chosen corresponded to prior "torchings" of enterprise businesses.

Contrary to his assertions, Caliguri was not a "neutral relation" of the principal actors. As prior manager of enterprise taverns, he was aware of insurance coverage for fire loss. John Carbone told Weinstein the Black Knight fire was done by a professional. There was evidence Caliguri was one of two men involved in the February 1978 arson of competitor Night Moves. While acting as an assistant for the Night Moves bomber, he stated that he had prior experience in destroying businesses.

This evidence and testimony that he was ordered to do something about the Black Knight less than two weeks before its destruction, support his conviction as an aider and abettor. The prosecution theorized Caliguri was aware of a high probability of fraud. He could not deliberately close his eyes to avoid learning the truth. See United States v. McDonald, 576 F.2d 1350, 1358 (9th Cir.), cert. denied, 439 U.S. 830 (1978). The evidence supports his conviction.

CONCLUSION

Appellants, jointly and singly, raise additional objections. We have carefully received the record and find no merit to their contentions.

Appellants strenuously object to the district court's denial of their severance motions. Fed.R.Cr. Pro 14. Assuming they properly preserved their objections by renewing the motions at the close of all the evidence, see United States v. Kaplan, 554 F.2d 958, 965 (9th Cir.), cert. denied, 434 U.S. 956 (1977), we find no abuse of discretion in refusing to sever the trials.[30/]

Janovich asserts that the trial judge engaged in improper prosecutorial conduct when he questioned a witness. He cites but one incident occupying five pages of a transcript exceeding 8,000 pages.

The court may examine a witness to clarify testimony if it avoids the appearance of partiality. United States v. Allsup, 566 F.2d 68, 72 (9th Cir. 1977). The challenged colloquy was well within the bounds of proper questioning. Janovich's objections to the grand jury proceedings are similarly without merit.

Williams' argument against forfeiture of his interest in Mr. Lucky's tavern pursuant to 18 U.S.C. § 1963(a), is merely derivative. It fails because his RICO conviction is affirmed.

Caliguri objects to discretionary evidentiary rulings and asserts that prejudicial outbursts from prosecution witnesses necessitated a mistrial. This was a protracted trial involving numerous charges, defendants and lawyers. Nonetheless, the record is remarkably free of even harmless error, let alone prejudicial error. The judge gave appropriate limiting instructions. Any error was harmless.

The district court judgment is affirmed. The mandate will issue at once. Release on bail as to any defendant is revoked now.

FOOTNOTES

1/ The Players (1972); The Exit (1976); Black Knight (1977).

2/ The Family Amusement Center was damaged by fire in March 1977. The Top of the Ocean disco and restaurant was destroyed by fire in April 1977. The Black Forty tavern suffered three arsons in 1977. The Night Moves tavern was firebombed in November 1977 and destroyed by fire in February 1978.

3/ Under Washington law wagers are restricted to a $5.00 maximum. Wash. Rev. Code § 9.46.020(20)(f); Wash. Admin. Code 230-40-120. Pot limit poker games run for the profit of the house are felonious under state law. Wash. Rev. Code § 9.46.220. See §§ 9.46.020(20)(c)-(d); -.020(17).

Under Washington law blackjack games are illegal unless played in connection with charitable events and with a special license. Wash. Rev. Code § 9.46.030(7).

4/ The district court expressly found the tapes and transcripts to be accurate and authentic and this finding is not challenged on appeal. See United States v. King, 587 F.2d 956, 961 (9th Cir.1978).

Janovich does assert that tapes of conversations between an undercover agent, and himself and Williams, should be excluded as obtained contrary to state law. Wash. Rev. Code, Ch. 9.73.030 (prohibiting recordings absent consent of all parties or court order). The conversations were recorded pursuant to 18 U.S.C. § 2511(c) which permits recording if one party gives prior consent or acts under "color of law."

To be admissible, the recordings need only satisfy federal law and constitutional requirements. United States v. Keen, 508 F.2d 986 (9th Cir. 1974), cert. denied, 421 U.S. 929 (1975). I. one party consents, there is no federal constitutional violation. Id. Thus, even though state statutes may require the consent of both parties, admissibility in federal court is determined by federal law. United States v. Testa, 548 F.2d 847, 855 (9th Cir. 1977).

4/ (cont'd):

Janovich's attempt to distinguish his case from Keen is not persuasive. He argues state law applies because he was "charged" with "underlying state crimes." Although state offenses are incorporated into federal racketeering and gambling statutes, violation of state law is not the sole element of the charged federal offenses. The statutes serve independent federal purposes and are not merely an attempt to enforce state law. See United States v. Forsythe, 560 F.2d 1127, 1135 (3d Cir. 1977); In re Bianchi, 542 F.2d 98, 101 (1st Cir. 1976); United States v. Sacco, 491 F.2d 995, 1003 (9th Cir. 1974) (en banc).

The indictment charged Janovich with federal offenses. The recordings satisfied the requirements of the constitution and federal law.

5/ The indictment was returned on December 8, 1978 in the Western District of Washington. On January 26, 1979, and February 9, 1979, the trial court granted motions for change of venue and the case was ultimately transferred to the Northern District of California, the Honorable Morell E. Sharp of the Western District of Washington, sitting by designation. Trial by jury began on March 19, 1979, and concluded with verdicts on June 19, 1979.

6/ John Carbone and Williams received multiple concurrent sentences and cumulative fines for all counts. Carbone was charged and convicted on 14 counts. Williams was charged and convicted on 13 counts. Both were sentenced to two 22-year terms for counts 1 and 2 (alleging violations of 18 U.S.C. § 1962(c) and (d)) to be served concurrently. Both were sentenced to five years on each of the remaining counts to be served concurrently with each other but consecutively to the count 1 sentence. Thus, both effectively received 25 year sentences. The total amount of the fines imposed against John Carbone was $163,000; the total for Williams was $172,000.

Mazzuca received a 15-year sentence for count 1. He was charged and convicted on three other counts for which he received three five-year sentences to be served concurrently with each other and count 1. The court imposed fines totalling $25,000.

Joseph Carbone was sentenced to 18 years on count 1. The sentences on the four remaining counts for which he was convicted are to be served concurrently with count 1. The aggregate fine for all counts was $38,000.

The court imposed sentences against Janovich, Caliguri or Zemek and ordered their sentences to be served concurrently. Thus, Janovich and Zemek were sentenced to effective terms of 12 years. Caliguri received a maximum 18-year sentence for the four counts for which he was convicted.

7/ 18 U.S.C. § 1961(1) provides:

"Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

8/ 18 U.S.C. § 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

9/ See, e.g., United States v. Aleman, 609 F.2d 298, 311 (7th Cir. 1979), cert. denied, 100 S.Ct. 1345 (1980) (Swygert, J., dissenting); United States v. Rone, 598 F.2d 564, 573-74 (9th Cir. 1979), cert. denied, 100 S.Ct. 1345 (1980) (Ely, J., dissenting); United States v. Grzywacz, 603 F.2d 682, 690-91 (7th Cir. 1979), cert. denied, 100 S.Ct. 2152 (1980) (Swygert, J., dissenting); United States v. Altese, 542 F.2d 104, 107-110 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977) (Van Graafeiland, J., dissenting). Bradley, Racketeers, Congress & the Courts: An Analysis of RICO, 65 Iowa L. Rev. 837, 892-93 (1980); Note, 65 Va. L. Rev. 109 (1979); Note, 27 De Paul L. Rev. 89, 105, 112 (1977).

10 See, e.g., United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert. denied, 100 S. Ct. 1345 (1980). United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977).

11/ United States v. [illegible], 591 F.2d 513 (9th Cir. 1979) does not dictate a contrary result. Therein the court reversed a conviction based on juror bias. In dictum, the court considered the issue of multiple conspiracies because it was likely to arise on remand. The court expressly relied on United States v. Perry, 550 F.2d 524 (9th Cir.), cert. denied, 434 U.S. 827 (1977), in which the court stated at 533:

> When the possibility of a variance appears between the indictment and the trial proof, the trial court should instruct the jury on multiple conspiracies . . . . However, because of our finding, supra, that there is no such variance in the instant case, the failure of the trial court to instruct on multiple conspiracies caused no harm or prejudice to the defendants and, as such, is not reversible error.

12/ In Elliott v. United States, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978), the Fifth Circuit construed the enterprise concept in RICO as circumventing limitations imposed by conventional conspiracy doctrine. 571 F.2d at 900. The court described RICO as supplanting the common objective rationale of conspiracy law with the enterprise concept whereby criminal association itself could constitute an enterprise.

It has been noted that the language and legislative history of RICO do not expressly indicate an intent to rework basic conspiracy law as related to organized crime. See Note, 65 U. Va. L. Rev. 109 (1979). See also United States v. Anderson, ___ F.2d ___ (8th Cir., Nos. 79-1809, 79-1827, August 7, 1980). In any event, the conspiratorial objective herein is not as ill-defined as in Elliott. A single overall agreement can be identified under conventional conspiracy doctrine.

13/ Janovich urges this court to follow the Fifth Circuit citing United States v. Jones, 576 F.2d 1121 (5th Cir. 1978), modified en banc, 590 F.2d 575, cert. denied, 442 U.S. 917 (1979). In its en banc opinion, the Fifth Circuit expressed a "preference" for pretrial determination of admissibility, if "reasonably practicable." 590 F.2d at 587. In light of consistent Ninth Circuit precedent allowing conditional admission, we reject Janovich's argument for a mandatory pretrial determination. We note that even under the Fifth Circuit's asserted preference, the practicality of a pretrial determination is questionable here.

14/ Carbone told Weinstein that he could describe, in "very authentic" detail, Weinstein's assault. He stated that Weinstein was "hollerin" and he "heard him." He related details about the assault and that the assailant was "supposed to get paid by the limb" but his weapon broke.

15/ Although Mazzuca attacks the admission of certain evidence, see note 18, infra, he does not directly challenge the sufficiency of the evidence as to count 1. He does assert that a conspiracy to obstruct state gambling laws, 18 U.S.C. § 1551, is not properly chargeable as a predicate crime of a RICO conspiracy under 18 U.S.C. § 1962(d). He argues inclusion thereof creates a "conspiracy to conspire" which is void for vagueness.

RICO itself has consistently withstood constitutional challenges as void for vagueness. See, e.g., United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). The essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering. "Pattern" is expressly defined as two or more predicate offenses. 18 U.S.C. § 1961(1) lists several acts of racketeering including violation of 18 U.S.C. § 1511. 18 U.S.C. § 1961(1)(B). Cf. United States v. Weisman, ___ F.2d ___ (2d Cir., Nos. 79-1315, 79-1318, April 4, 1980) (conspiracy can be properly charged as predicate act under 18 U.S.C. § 1962(c) when it involves any of the substantive offenses listed in § 1961(1)(D)).

Count 1 did not charge appellants with a conspiracy to conspire. Cf. United States v. Feliziani, 472 F. Supp. 1037, 1042 (E.D.Pa. 1979), aff'd, 622 F.2d 580 (1980) (evidence sufficient to support convictions under both 18 U.S.C. § 1962(d) and § 1511).

Mazzuca further objects to application of RICO as unconstitutional, citing Griswold v. Connecticut, 381 U.S. 479 (1965). Absent development of authority and some relation to the facts of this case, we decline to hypothesize constitutional defects.

16/ See pp. 35-38, infra.

17/ Caliguri claims that the government proved that he conspired to commit only one predicate crime. The evidence showed that in fact he agreed to commit a substantial number of predicate crimes on behalf of the enterprise. Appellant conspired to commit a series of predicate crimes against Night Moves (arson, extortion, bombing). He was also aided in three separate instances of mail fraud. See pp. 35-38, infra.

18/ Mazzuca challenges admission of certain evidence pertaining to overt acts in the count 1 conspiracy. Overt acts need not be criminal but must be in furtherance of the conspiracy. United States v. Young, 573 F.2d 1137 (9th Cir. 1978). If evidence of other misconduct tends to prove some element of the crime charged, such as knowledge, intent, motive, design or scheme, it may be admissible.

Once the trial court determines evidence of extrinsic acts is relevant, it must weigh the probative value of the evidence against its prejudicial effect and that determination is not disturbed absent an abuse of discretion. United States v. Riggin, 539 F.2d 682 (9th Cir. 1976), cert. denied, 429 U.S. 1045 (1977). An important consideration in this process is whether the other acts are closely connected in time and nature to the offense charged. We find such a connection. The district court did not abuse its discretion in admitting the challenged evidence.

19/ Only Williams and John Carbone were sentenced to terms to be served consecutively with the count 1 sentence. See note 6 supra. As to the Carbones, Williams and Mazzuca, the practical effect of reversal on any of the remaining counts would be a reduction in fines.

The court imposed concurrent sentences and assessed no fines against Janovich, Zemek, and Caliguri. Nevertheless, the nature of the charges and the complexity of the case compel us to examine the challenges as to the remaining counts rather than invoke the concurrent sentence doctrine.

20/ Caliguri also argued that the interstate commerce nexus was established. The effect on interstate commerce need only be de minimis. An actual effect is not required for an attempted Hobbs Act violation; the effect need only be "probable" or "potential." See United States v. Phillips, 577 F.2d 495 (9th Cir.), cert. denied, 439 U.S. 831 (1978). See also, United States v.Brooklier, 459 F.Supp. 4[illegible] (C.D. Calif. 1978).

There was evidence the Chases purchased supplies and hired employees from out-of-state. Threatened depletion of resources from a business engaged in interstate commerce provides an adequate jurisdictional base. United States v. Phillips, supra. The jury was so instructed (No. 18). It is not necessary that the subject of the extortion constitute commerce, only that commerce be affected in some way. Carbo v. United States, 314 F.2d 718, 732 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964). See also United States v. Staszcuk, 517 F.2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972).

21/ The San Martin court stated:

> A literal reading of the provision of the statute under consideration indicates that it is aimed at deterring interference with future communication of information. It does not prohibit the making of a threat, as opposed to the infliction of bodily injury, in retaliation for having communicated information to a criminal investigator, at least where such a threat cannot be interpreted as having been intended to interfere with future communication of additional information or with continued cooperation.

515 F.2d at 320 (emphasis added).

The Fifth Circuit's distinction between retaliation and deterrence is arguably limited to 18 U.S.C. § 1510(a) ¶ 1 which speaks of willfully endeavoring to obstruct, delay or prevent communication. Paragraph 2 addresses actual injury "on account of" the giving of information. The instant case involved infliction of bodily injury, not merely the making of a threat.

22/ Although the statute requires that the intended recipient of the communications be an "investigator" as defined under the act, (18 U.S.C. § 1510(b)), proof of that element is not challenged.

23/ Count 9 of the indictment charged [illegible] pot limit poker games from [illegible] to [illegible] 1978. As to this count, the jury [illegible] option.

24/ Such an argument would be unavailing in light of United States v. Sacco, 491 F.2d 995 (9th Cir. 1974) (en banc).

25/ Cases tried under the 30 day option of 18 U.S.C. § 1955, rather than the $2,000 gross revenue option, do refer to occurrences of wide betting. See, e.g., United States v. Mattucci, 502 F.2d 883, 886-87 (6th Cir. 1974). Cf. United States v. Nettles, 570 F.2d 547, 550 (5th Cir. 1978).

26/ Mazzuca and Janovich also object to the court's allegedly prejudicial limitation of cross-examination of agent Early. Early observed the action and testified as to the betting. A review of the record indicates that the stricken questions, propounded by Mazzuca's counsel, addressed the issue of net profit, not side betting. It is clear that the trial court and co-counsel so construed the area of inquiry. Indeed, co-defense counsel requested a mid-trial instruction clarifying that net profit is not to be equated with gross revenue.

27/ One of the gambling operators testified that Mazzuca told him of a "higher up" in the operation who could be called upon to resolve disputes between Mazzuca and Williams.

28/ 18 U.S.C. § 1511 provides in part:

> (a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if --
>
> (1) one or more of such persons does any act to effect the object of such a conspiracy;
>
> (2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and
>
> (3) one or more of such persons conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business.

Williams was also charged under count 11 but does not challenge the sufficiency of the evidence.

29/ 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, [illegible] shall be fined not more than $1,000 or imprisoned not more than five years, or both.

30/ Spillover and inability to compartmentalize are the primary objections of Zemek, Jaworich, Joe Carbone and Caliguri. We assume the jury follows limiting instructions to compartmentalize the evidence as to each defendant. United States v. Escalante, ___ F.2d ___, (9th Cir., No. 78-2794, April 29, 1980). Such instructions were given during trial and before deliberations. There is no indication the jury was unable to appraise the evidence against each defendant in accord with the court's admonitions and instructions. See United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). Of the eight persons jointly tried, one (Lovage) was acquitted.

Although the quantum of evidence as to certain defendants may have been greater than that as to others, such a disparity has been considered significant only when conspiracy charges were dismissed during trial. See United States v. Polizzi, 500 F.2d 856, 902, n.11 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

FILED

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RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	NO. 79-1550
	)	
v.	)	
	)	
FRANK JULIUS MAZZUCA,	)	
	)	
Defendant-Appellant.	)	ORDER
	)	

Before: WRIGHT and SNEED, Circuit Judges.

Judges Wright and Sneed have voted to reject the petition and suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition and suggestion for a rehearing en banc is rejected.

A-50

28 U.S.C. §1254(1):

> Court of Appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certioriari granted upon a petition of any party to a civil or criminal case, before or after rendition of judgment or decree.

18 U.S.C. §1961(4):

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not legal entity;

18 U.S.C. §1962(c) and (d):

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, inter-state or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) and (c) of this section.

18 U.S.C. §2511(2)(c):

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. (emphasis added).

9.73.090	Police and fire personnel exempted from RCW 9.73.030-9.73.080——Standards——Authorizations by judge or magistrate——Admissibility of material.
9.73.100	Recordings available to defense counsel.
9.73.110	Intercepting, recording, or disclosing private communications——Not unlawful for building owner——Conditions.
9.73.120	Reports——Required, when, contents.
9.73.130	Recording private communications——Authorization——Application for, contents.
9.73.140	Recording private communications——Authorization of or application for——Inventory, contents, service——Availability of recording, applications, and orders.

9.73.010 Divulging telegram. Every person who shall wrongfully obtain or attempt to obtain, any knowledge of a telegraphic message, by connivance with the clerk, operator, messenger or other employee of a telegraph company, and every clerk, operator, messenger or other employee of such company who shall wilfully divulge to any but the person for whom it was intended, any telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature or contents thereof, or shall wilfully refuse, neglect or delay duly to transmit or deliver the same, shall be guilty of a misdemeanor. [1909 c 249 § 410; Code 1881 § 2342; RRS § 2662.]

Intercepting, delaying telegram: RCW 9A.48.070, 9A.48.080.

9.73.020 Opening sealed letter. Every person who shall wilfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person, or publish the whole or any portion of such a message, letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor. [1909 c 249 § 411; RRS § 2663.]

9.73.030 Intercepting or recording private communication——Consent required——Exceptions. (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding the provisions of subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, crime, or other disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

Chapter 9.73
PRIVACY, VIOLATING RIGHT OF

Sections

9.73.010	Divulging telegram.
9.73.020	Opening sealed letter.
9.73.030	Intercepting or recording private communication——Consent required——Exceptions.
9.73.040	Intercepting, recording, or divulging private communication——Court order permitting interception——Grounds for issuance——Duration——Renewal.
9.73.050	Intercepting, recording, or divulging private communication——Admissibility in evidence.
9.73.060	Violating right of privacy——Civil action for——Liability for damages.
9.73.070	Intercepting, recording, or divulging private communication——Persons and activities excepted.
9.73.080	Intercepting, recording, or divulging private communication——Penalty.

A-52

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: *Provided*, That if the conversation is to be recorded that said announcement shall also be recorded.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full time or contractual or part time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation. [1977 ex.s. c 363 § 1; 1967 ex.s. c 93 § 1.]

Severability——1967 ex.s. c 93: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1967 ex.s. c 93 § 7.] This applies to RCW 9.73.030-9.73.080.

9.73.040 Intercepting, recording, or divulging private communication——Court order permitting interception——Grounds for issuance——Duration——Renewal. (1) An ex parte order for the interception of any communication or conversation listed in RCW 9.73.030 may be issued by any superior court judge in the state upon verified application of either the state attorney general or any county prosecuting attorney setting forth fully facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that national security is endangered, that a human life is in danger, that arson is about to be committed, or that a riot is about to be committed, and

(b) There are reasonable grounds to believe that evidence will be obtained essential to the protection of national security, the preservation of human life, or the prevention of arson or a riot, and

(c) There are no other means readily available for obtaining such information.

(2) Where statements are solely upon the information and belief of the applicant, the grounds for the belief must be given.

(3) The applicant must state whether any prior application has been made to obtain such communications on the same instrument or for the same person and if such prior application exists the applicant shall disclose the current status thereof.

(4) The application and any order issued under RCW 9.73.030 through 9.73.080 shall identify as fully as possible the particular equipment, lines or location from which the information is to be obtained and the purpose thereof.

(5) The court may examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced.

(6) Orders issued under this section shall be effective for fifteen days, after which period the court which issued the order may upon application of the officer who secured the original order renew or continue the order for an additional period not to exceed fifteen days.

(7) No order issued under this section shall authorize or purport to authorize any activity which would violate any laws of the United States. [1967 ex.s. c 93 § 2.]

9.73.050 Intercepting, recording, or divulging private communication——Admissibility in evidence. Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security. [1967 ex.s. c 93 § 3.]

9.73.060 Violating right of privacy——Civil action for——Liability for damages. Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his business, his person, or his reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured by him on account of violation of the provisions of this chapter, or liquidated damages computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorney's fee and other costs of litigation. [1977 ex.s. c 363 § 2; 1967 ex.s. c 93 § 4.]

9.73.070 Intercepting, recording, or divulging private communication——Persons and activities excepted. The provisions of this chapter shall not apply to any activity in connection with services provided by a common carrier pursuant to its tariffs on file with the Washington utilities and transportation commission or the Federal Communication Commission and any activity of any officer, agent or employee of a common carrier who performs any act otherwise prohibited by this law in the construction, maintenance, repair and operations of the common carrier's communications services, facilities, or equipment or incident to the use of such services, facilities or equipment. Common carrier as used in this section means any person engaged as a common carrier or public service company for hire in intrastate, interstate or foreign communication by wire or radio or in intrastate, interstate or foreign radio transmission of energy. [1967 ex.s. c 93 § 5.]

A-53

9.73.080 Intercepting, recording, or divulging private communication——Penalty. Any person who shall violate RCW 9.73.030 shall be guilty of a gross misdemeanor. [1967 ex.s. c 93 § 6.]

9.73.090 Police and fire personnel exempted from RCW 9.73.030–9.73.080——Standards——Authorizations by judge or magistrate——Admissibility of material. (1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police and fire personnel in the following instances:

(a) Recording incoming telephone calls to police and fire stations;

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities.

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: *Provided*, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony: *Provided however*, That if such authorization is given by telephone the authorization and officer's statement justifying such authorization must be electronically recorded by the judge or magistrate on a recording device in the custody of the judge or magistrate at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter.

Any recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.

All recordings of communications or conversations made pursuant to this subsection shall be retained for as long as any crime may be charged based on the events or communications or conversations recorded.

(3) Communications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under RCW 9.73.050.

(4) Authorizations issued under this section shall be effective for not more than seven days, after which period the issuing authority may upon application of the officer who secured the original authorization renew or continue the authorization for an additional period not to exceed seven days. [1977 ex.s. c 363 § 3; 1970 ex.s. c 48 § 1.]

Severability——1970 ex.s. c 48: "If a court of competent jurisdiction shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section or part of this act, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this act, but the effect thereof shall be confined to the clause, sentence, paragraph, section or part of this chapter so adjudged to be invalid or unconstitutional." [1970 ex.s. c 48 § 3.] This applies to RCW 9.73.090 and 9.73.100.

9.73.100 Recordings available to defense counsel. Video and/or sound recordings obtained by police personnel under the authority of RCW 9.73.090 and 9.73.100 shall be made available for hearing and/or viewing by defense counsel at the request of defense counsel whenever a criminal charge has been filed against the subject of the video and/or sound recordings. [1970 ex.s. c 48 § 2.]

9.73.110 Intercepting, recording, or disclosing private communications——Not unlawful for building owner——Conditions. It shall not be unlawful for the owner or person entitled to use and possession of a building, as defined in RCW 9A.04.110(5), or the agent of such person, to intercept, record, or disclose communications or conversations which occur within such building if the persons engaged in such communication or conversation are engaged in a criminal act at the time of such communication or conversation by virtue of unlawful entry or remaining unlawfully in such building. [1977 ex.s. c 363 § 4.]

9.73.120 Reports——Required, when, contents. (1) Within thirty days after the expiration of an authorization or an extension or renewal thereof issued pursuant to RCW 9.73.090(2) as now or hereafter amended, the issuing or denying judge shall make a report to the administrator for the courts stating that:

(a) An authorization, extension or renewal was applied for;

(b) The kind of authorization applied for;

(c) The authorization was granted as applied for, was modified, or was denied;

(d) The period of recording authorized by the authorization and the number and duration of any extensions or renewals of the authorization;

(e) The offense specified in the authorization or extension or renewal of authorization;

(f) The identity of the person authorizing the application and of the investigative or law enforcement officer and agency for whom it was made; and

(g) The character of the facilities from which or the place where the communications were to be recorded.

A-54

(2) In addition to reports required to be made by applicants pursuant to federal law, all judges of the superior court authorized to issue authority pursuant to this chapter shall make annual reports on the operation of this chapter to the administrator for the courts. The reports by the judges shall contain (a) the number of applications made; (b) the number of authorizations issued; (c) the respective periods of such authorizations; (d) the number and duration of any renewals thereof; (e) the crimes in connection with which the conversations were sought; (f) the names of the applicants; and (g) such other and further particulars as the administrator for the courts may require.

The chief justice of the supreme court shall annually report to the governor and the legislature on such aspects of the operation of this chapter as he deems appropriate including any recommendations he may care to make as to legislative changes or improvements to effectuate the purposes of this chapter and to assure and protect individual rights. [1977 ex.s. c 363 § 5.]

9.73.130 Recording private communications——Authorization——Application for, contents. Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state:

(1) The authority of the applicant to make such application;

(2) The identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to record a communication or conversation is sought and the identity of whoever authorized the application;

(3) A particular statement of the facts relied upon by the applicant to justify his belief that an authorization should be issued, including:

(a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;

(b) The details as to the particular offense that has been, is being, or is about to be committed;

(c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;

(d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;

(e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

(4) Where the application is for the renewal or extension of an authorization, a particular statement of facts showing the results thus far obtained from the recording, or a reasonable explanation of the failure to obtain such results;

(5) A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to record a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each application; and

(6) Such additional testimony or documentary evidence in support of the application as the judge may require. [1977 ex.s. c 363 § 6.]

9.73.140 Recording private communications——Authorization of or application for——Inventory, contents, service——Availability of recording, applications, and orders. Within a reasonable time but not later than thirty days after the termination of the period of the authorization or of extensions or renewals thereof, or the date of the denial of an authorization applied for under RCW 9.73.090 as now or hereafter amended, the issuing authority shall cause to be served on the person named in the authorization or application for an authorization, and such other parties to the recorded communications as the judge may in his discretion determine to be in the interest of justice, an inventory which shall include:

(1) Notice of the entry of the authorization or the application for an authorization which has been denied under RCW 9.73.090 as now or hereafter amended;

(2) The date of the entry of the authorization or the denial of an authorization applied for under RCW 9.73.090 as now or hereafter amended;

(3) The period of authorized or disapproved recording; and

(4) The fact that during the period wire or oral communications were or were not recorded.

The issuing authority, upon the filing of a motion, may in its discretion make available to such person or his attorney for inspection such portions of the recorded communications, applications and orders as the court determines to be in the interest of justice. On an ex parte showing of good cause to the court the serving of the inventory required by this section may be postponed or dispensed with. [1977 ex.s. c 363 § 7.]

Chapter 10.79
SEARCHES AND SEIZURES

Sections

10.79.010 Issuance of warrant for stolen property, etc.
10.79.015 Other grounds for issuance of search warrant.
10.79.020 To whom directed——Contents.
10.79.030 Execution of warrant——Disposition of property.
10.79.040 Search without warrant unlawful.
10.79.045 Search without warrant unlawful——Penalty.
10.79.050 Restoration of stolen property to owner——Duties of officers.

Rules of court: Search and seizure——CrR 2.3; JCrR 2.10.

Alcoholic beverage control——Search and seizure: Chapter 66.32 RCW.

Controlled substances, search and seizure: RCW 69.50.509.

Seizures and disposition of gambling devices: RCW 9.46.230.

10.79.010 Issuance of warrant for stolen property, etc. When complaint shall have been made on oath, to any magistrate authorized to issue warrants in criminal cases, that personal property has been stolen or embezzled, or obtained by false tokens or pretenses, and that the complainant believes that it is concealed in any particular house or place; the magistrate, if he be satisfied that there is reasonable cause for such belief, shall issue a warrant for such property. [Code 1881 § 967; 1873 p 216 § 153; 1854 p 100 § 1; RRS § 2237. FORMER PART OF SECTION: 1949 c 86 § 1; Code 1881 § 968; 1873 p 216 § 154; 1854 p 100 § 2; Rem. Supp. 1949 § 2238, now codified as RCW 10.79.015.]

Rules of court: This section superseded by CrR 2.3. See comment after CrR 2.3.

10.79.015 Other grounds for issuance of search warrant. Any such magistrate, when satisfied that there is reasonable cause, may also, upon like complaint made on oath, issue search warrant in the following cases, to wit:

(1) To search for and seize any counterfeit or spurious coin, or forged instruments, or tools, machines or materials, prepared or provided for making either of them.

(2) To search for and seize any gaming apparatus used or kept, and to be used in any unlawful gaming house, or in any building, apartment or place, resorted to for the purpose of unlawful gaming.

(3) To search for and seize any evidence material to the investigation or prosecution of any homicide or any felony.

(4) To search for and seize any instrument, apparatus or device used to obtain telephone or telegraph service in violation of RCW 9.45.240. [1972 ex.s. c 75 § 2; 1969 c 83 § 1; 1949 c 86 § 1; Code 1881 § 986; 1873 p 216 § 154; 1854 p 101 § 2; Rem. Supp. 1949 § 2238. Formerly RCW 10.79.010, part.]

10.79.020 To whom directed——Contents. All such warrants shall be directed to the sheriff of the county, or his deputy, or to any constable of the county, commanding such officer to search the house or place where the stolen property or other things for which he is required to search are believed to be concealed, which place and property, or things to be searched for shall be designated and described in the warrant, and to bring such stolen property or other things, when found, and the person in whose possession the same shall be found, before the magistrate who shall issue the warrant, or before some other magistrate or court having cognizance of the case. [Code 1881 § 969; 1873 p 216 § 155; 1854 p 101 § 3; RRS § 2239.]

10.79.030 Execution of warrant——Disposition of property. When any officer in the execution of a search warrant shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by RCW 10.79.010 through 10.79.030, all the property and things so seized, shall be safely kept by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced in evidence on any trial, and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be returned to the owner thereof if such may be legally done or shall be destroyed under direction of the court or magistrate. [1949 c 86 § 2; Code 1881 § 970; 1873 p 217 § 156; 1854 p 101 § 4; Rem. Supp. 1949 § 2240.]

Rules of court: This section superseded by CrR 2.3. See comment after CrR 2.3.

10.79.040 Search without warrant unlawful. It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided. [1921 c 71 § 1; RRS § 2240-1. FORMER PART OF SECTION: 1921 c 71 § 2; RRS § 2240-2, now codified as RCW 10.79.045.]

10.79.045 Search without warrant unlawful——Penalty. Any policeman or other peace officer violating the provisions of RCW 10.79.040 shall be guilty of a gross misdemeanor. [1921 c 71 § 2; RRS § 2240-2. Formerly RCW 10.79.040, part.]

10.79.050 Restoration of stolen property to owner——Duties of officers. All property obtained by larceny, robbery or burglary, shall be restored to the

A-56

owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property; and it shall be the duty of the officer who shall arrest any person charged as principal or accessory in any robbery or larceny, to secure the property alleged to have been stolen, and he shall be answerable for the same, and shall annex a schedule thereof to his return of the warrant. [Code 1881 § 851; 1873 p 192 § 57; 1854 p 84 § 51; RRS § 2129.]

RULES OF CRIMINAL PROCEDURE, Rule 7 provides in pertinent part:

Rule 7. The Indictment and the Information

(a) **

(b) **

(c) Nature and Contents.

(1) The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) **

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a convictionif the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from theindictment or information.

(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within tend days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.